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IN THE

Supreme Court of the United States

No. 1046

EVERTT W. THOMPSON,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For the Fifth Circuit

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This petition for writ of certiorari by Evertt W. Thompson is directed to the judgment entered by the United States Court of Appeals for the Fifth Circuit in cause No. 20,531, wherein this petitioner, together with William R. Phillips and Earl N. Stokes, was an appellant. The opinion on said appeal has not yet been reported. Said opinion is included in the Appendix hereto, pp. 1-9.

The Record certified to the Supreme Court by the Court of Appeals will be referred to herein by the letter

"R", with appropriate reference to the page(s). The appendix to this petition will be referred to by the letter "A".

JURISDICTION

Jurisdiction of the Supreme Court is sought under the provisions of Supreme Court Rule 19(b), in that the Court of Appeals has rendered its decision, in three aspects, in conflict with the decisions of other United States Courts of Appeal and of the Supreme Court; and, as to all the points urged herein, so far departed from the accepted and usual cause of judicial proceedings as to call for an exercise of this court's power of supervision.

The judgment sought to be reviewed was entered February 2, 1965 (A. 10). Petition for rehearing was filed by this petitioner on February 18, 1965 (R. 245-249). This petition for rehearing, along with the petitions of the other two appellants, Phillips and Stokes, was denied by the Court of Appeals by order filed March 12, 1965 (R. 286, A. 12). Order granting stay of mandate for thirty days from March 12, 1965 was entered by the Court of Appeals and filed March 31, 1965 (A. 13-14).

Petitioner believes that jurisdiction is conferred on the Supreme Court to review the aforesaid judgment by Title 28, Section 1254(1), United States Code.

QUESTIONS PRESENTED

The following questions are here presented for review:

I.

A. IN A CRIMINAL TRIAL, DOES THE UNAUTHORIZED QUESTIONING BY THE DEPUTY UNITED STATES MARSHAL IN CHARGE OF THE JURY OF A JUROR ABOUT HER CONVERSATION WITH ONE OF THE DEFENDANTS, CONSTITUTE PREJUDICIAL, AND CONSEQUENTLY, REVERSIBLE, ERROR?

B. IN SUCH CASE, DOES THE PRESUMPTIVELY PREJUDICIAL ERROR REQUIRE A REVERSAL OF CONVICTION WHERE THERE IS NO ADJUDICATION THAT THE ERROR WAS "HARMLESS", THE TRIAL COURT HAVING DENIED THE MOTION FOR NEW TRIAL (ON THIS POINT) ONLY UNDER THE ERRONEOUS ASSUMPTION OR RECOLLECTION THAT THE DEFENDANTS HAD BEEN INFORMED OF THE ERROR AND HAD WAIVED IT, AND THE COURT OF APPEALS HAVING INACCURATELY PRESUMED THAT THE TRIAL COURT HAD MADE A FINDING OF HARMLESS ERROR?

II.

WAS THE SEARCH OF AN AUTOMOBILE WITHOUT A SEARCH WARRANT VALID WHERE THE AUTOMOBILE WAS PARKED AND UNATTENDED ON THE SOUTH SIDE OF 15th STREET, AT MIAMI AVENUE, IN MIAMI, FLORIDA, APPROXIMATELY 12 BLOCKS FROM THE FEDERAL BUILDING, ON LARGELY ENCLOSED PROPERTY OF A BUSINESS CORPORATION OF WHICH PETITIONER WAS AN OFFICER, PETITIONER BEING PRESENT AND WORKING AT THE TIME ON THE CORPORATION'S PREMISES ACROSS 15th STREET, THERE BEING SOME THREE CARLOADS OF STATE AND FEDERAL OFFICERS PRESENT OR IN THE IMMEDIATE VICINITY OF THE SEARCH AND NO EFFORT WAS BEING MADE OR THREATENED TO MOVE THE VEHICLE, AND NO EXCUSE OR REASON BEING SHOWN FOR NOT REQUESTING A SEARCH WARRANT?

III.

A. IS THERE A FATAL VARIANCE WHERE AN INDICTMENT CHARGES A SINGLE CRIMINAL CONSPIRACY AND SEVENTEEN SUBSTANTIVE CHARGES OF VIOLATIONS OF THE FEDERAL LIQUOR TAX LAWS, THREE (AT LEAST TWO WERE CONCEDED) SEPARATE AND PARALLEL CONSPIRACIES WERE SHOWN BY THE GOV-

ERNMENT'S EVIDENCE, AND THE PETITIONER WAS CONVICTED ON THE CONSPIRACY COUNT AND SIX (6) SUBSTANTIVE COUNTS OF JOINT VIOLATIONS WITH THE DEFENDANT STOKES, WITH WHOM, THE GOVERNMENT CONCEDED, THE PETITIONER HAD NO CONNECTION?

B. IS THERE A FATAL VARIANCE WHERE TWO DEFENDANTS, WHO, IT WAS CONCEDED BY THE GOVERNMENT, HAD NO CONNECTION WITH EACH OTHER, STAND CONVICTED ON SIX SUBSTANTIVE COUNTS OF AN INDICTMENT CHARGING SAID DEFENDANTS JOINTLY?

STATUTES INVOLVED

The indictment charges the petitioner with violations of the following statutes of the United States:

Sections 5601, Title 26, U.S.C.A., subsections (a); (a)(1); (a)(7); (a)(4); (a)(8);

Sections 5205, 5604, 5602 and 7206(4), Title 26, United States Code;

Title 18, United States Code, Section 371.

The language of these statutes is not pertinent to this petition, and consequently not set forth in the petition or the Appendix.

STATEMENT OF THE CASE

Jurisdiction of the criminal charges prosecuted in this case was vested in the District Court of the United States for the Southern District of Florida by Title 18, Section 3231, United States Code.

The facts material to the Questions here presented will be stated in the same order and under the same numbers as the Questions.

I.

Before court convened on the morning the final arguments were made, one of the jurors (Mrs. Higginbotham) was observed by a deputy marshal talking with the defendant Phillips. This incident was reported to the court by another deputy marshal, the one in charge of the jury, and the court called a bench conference, during the arguments, concerning the incident. The full details of the bench conference appear at R. 193-198, but are not related here for the reason that all parties waived any error as to the juror's conversation with Phillips.

After the jury returned its verdict (and on the same night), counsel for the petitioner heard for the first time that the deputy marshal had approached the juror, without the knowledge, consent or instruction of the court or the parties, called her aside and questioned her as to the conversation she had with Phillips. This conversation between the juror and the Marshal was urged as one ground for a new trial, and the marshal's testimony was taken on the matter before the court (R. 210-213). In substance, the marshal stopped the juror as she and the other jurors

were returning to the jury room from the courtroom, asked her what was said between her and Phillips, was told by the juror what was said, and the marshal dismissed her with the statement that she should not "mention it" to anyone and keep it to herself.

In ruling on petitioner's motion for new trial, the trial court said (R. 214):

> "As to the deputy marshal talking to the juror, I feel that the defendant himself is the one who talked to the juror and precipitated this undesirable situation. Immediately upon being called to my attention, I called it to the attention of all counsel without proceeding any further in the case, and I thought that the counsel were fully advised that this information was being reported by a marshal. I don't recall what the record shows precisely took place at our conference."

The trial court made no finding that the conversation between the juror and marshal was harmless.

In its opinion of affirmance, the Court of Appeals disposed of this point by inaccurately stating (R. 241, p. 7 of Opinion):

> "The trial Judge decided that the incident had been harmless, and that none of the conversation or the surrounding circumstances had been prejudicial to the accused. We find no abuse of discretion."

By inference, at least, the Court of Appeals also cast on the defendants the burden of inquiry, from the conversation between the juror and Phillips alone to ascertain that the marshal also questioned the juror about the incident (R. 241).

II.

Appellants Phillips and Thompson, through their respective counsel, moved to suppress any evidence seized from the 1953 Chrysler automobile (R. 104). Pages 103 to 164 of the Record include the full transcript of the hearing on these motions. The Court, at the conclusion of the hearing, denied the motions to suppress (R. 164).

State Agent Glass testified he learned from the informer Thorn early on the morning of April 5, 1962, that a load of liquor would be switched that night on the Dade Tire Company premises from the pick-up truck owned by Phillips to a dark green Chrysler automobile (R. 128, R. 136). At about 6:30 that evening, Thorn told Glass the liquor was there on the truck (R. 111, 129). (The Court of Appeals declared that probable cause came into being at this point.) Glass stationed himself some distance from the Dade Tire Company premises and said that just prior to 7:45 P.M. he watched Thorn, Phillips and Thompson transferring some apparently heavy objects in burlap bags from the truck to the Chrysler, all in the fenced-in area of the Dade Tire premises on the south side of Fifteenth Street (R. 131). Glass watched the truck leave, then called the other officers to come on in and get the Chrysler (R. 132). Phillips was apprehended in his truck some few blocks away from the Dade Tire Company and brought back to the Dade Tire premises (R. 119). He had pur-

chased a tire earlier that evening from Thompson (R. 112, 151, 156). Certain of the officers removed the back seat of the Chrysler and observed the burlap bags covering objects they described as the size and shape of five gallon jugs, and they then pried open the trunk of the Chrysler and found 50 gallons of moonshine whiskey (R. 111).

Thompson was not at the scene when the Chrysler was seized and searched, but was on the tire sales portion of Dade Tire on the north side of Fifteenth Street (R. 122, 144). Thompson was not under arrest at the time and was not placed under arrest until the following day (R. 121). Thompson testified that he had no interest in the Chrysler and that he ascertained from the mechanic who operated the wheel alignment business on a lease basis that the Chrysler had been brought in some two days earlier for some repair work (R. 152, 153).

The property on the south side of Fifteenth Street where the Chrysler was located as well as that on the north side is owned by Warren-Ray Corporation, of which Thompson is an officer (R. 154); and used by Dade Tire Company, of which Thompson is an officer and full time employee (R. 149, 150). The premises on the south side operated as a wheel alignment setup, were fenced or walled in completely on the east, south and west sides and partly on the north side, except for an opening in the fence about three cars wide, for access to the lot (R. 154, 155). The Chrysler was parked wholly inside the enclosure, against the fence on the west end, with no key in the switch and no one in or about the car, when the officers approached and made the search and seizure (R. 114, 121, 122). There was a "whole bunch of officers" present (R. 124).

The officers had no search warrant either for the Dade Tire premises or the Chrysler (R. 114, 115) when they went on the Dade Tire premises and searched the Chrysler, and had made no attempt to secure a search warrant (R. 136); and had no permission to go on the premises or search the Chrysler (R. 124). The officers knew (R. 128) early on the morning of April 5 and had confirmed, at least by 6:30 P.M. on that date, that the Chevrolet pick-up truck and the Chrysler were the vehicles involved in the transfer of whiskey at Dade Tire Company (R. 123). At 6:30 the informer told the agents the whiskey was on the premises in the truck.

III

The United States attorney conceded (R. 187, 188, 192) and the Court judicially pronounced (R. 185) that two separate and distinct conspiracies had been shown in the evidence to support Count I, charging a single conspiracy among the three appellants and Brown, Gaither, Cain and Thorn. As the Court remarked (R. 185)

> "There are other defendants, of course, but the fact remains that we have two absolutely separate conspiracies as counsel has candidly admitted and the knowledge of Stokes and Thompson does not carry over one to the other."

We also urged to the court that there was a probable third conspiracy (R. 192). Of the two separate conspiracies conceded, one involved Phillips, Thorn and Stokes, but not Thompson, while the other involved, taking the Government's evidence in its most favorable light, Phillips, Thorn and Thompson, but not Stokes.

Thorn, the only witness on the conspiracy count except as to one overt act (No. 21), admitted that Stokes did not know anything of Thompson's alleged involvement during the operation (R. 52).

Superimposing the admitted fact that there was no connection between Stokes and Thompson upon alleged overt acts of Count I and assuming these overt acts to have been proved as alleged, we have a clear showing of a third conspiracy, as we contended, the third one involving Brown, Gaither and Stokes, and possibly Thorn, but certainly not Thompson. In Count 1, the only overt acts naming Brown, Gaither and Cain were numbered 22, 23 and 24, alleging respectively that on April 11 Stokes employed Brown and Gaither to operate the still, that on April 12 Brown employed Cain to repair the still and that on April 12, Brown, Gaither and Cain made repairs to the still (R. 8). These acts occurred about a week after Thompson and Phillips were arrested.

In connection with Thompson's motion for mistrial for joining him in trials of unrelated charges and with unrelated parties, directed to all counts, it is important to note that the indictment charges Stokes and Thompson with being connected, not only in the conspiracy, but in substantive counts 2, 3, 4, 6, 8 and 16.

ARGUMENT

AS TO THE MARSHAL'S CONTACT WITH THE JUROR.

It is clear that the unauthorized approach by the marshal to the juror creates presumptively prejudicial

error, notwithstanding that the presumption is rebuttable. See **Remmer v. U.S.**, 1954, 347 US 227, 74 S.Ct. 450; **Mattox v. United States**, 146 U.S. 140, 148-150, 13 S.Ct. 50, 53, 36 L.Ed. 917; **Pekar v. United States**, 315 F.2nd 319 (1963, CCA 5); and **Ryan v. United States**, 191 F.2nd 779, CCA, DC, 1951.

As stated by Mr. Justice Minton in Remmer, supra:

> "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of defendant, that such contact was harmless to defendant."

We have urged two related points under Question I:

1. That the unauthorized conversation initiated by the marshal, informing the juror that she was seen talking with a defendant, quizzing her about what was said, and telling her to say nothing about the matter, is, in itself, bound to have created a state of mind in the juror inimical to a fair trial of the defendants. To say it another way, this occurrence is patently calculated to militate against a fair trial, and to make a simple judicial declaration that the error was harmless an unreal and unreasonable conclusion.

2. That there has been no determination by either the trial or the appellate court, right or wrong, that the error was harmless, the pronouncement by the Court of Appeals that the trial court had made such a determination to the contrary notwithstanding.

Petitioner produced the testimony of the marshal which proved that the conversation occurred, that it occurred without the knowledge or instruction of the parties or the court, and that the conversation related to the trial itself. Other than cross-examine the marshal briefly, the government offered no evidence to off-set the presumption of prejudicial error.

To say that confronting a juror with knowledge that the juror was in effect, caught talking with a defendant, contrary to the court's instructions, with the inference that the juror was perhaps friendly with the defendant and inclined to favor him, is not harmful, is to stretch reasoning, in our opinion, beyond the breaking point.

On this point, the Court of Appeals has recognized the controlling principles of law, at least in its decisions prior to this, but disposed of the problem by erroneously assuming that the trial court had made a finding of harmless error. Consequently, we say, the Court of Appeals has, by serious error based upon a false assumption of fact, departed from the accepted course of judicial proceedings which the Court itself had professed to follow.

II.

AS TO THE SEARCH WITHOUT A WARRANT.

When the several state and federal officers went on the premises of Dade Tire to search the Chrysler, the vehicle was sitting, unoccupied, in a business lot enclosed completely on three sides and partly on the north side, with only an opening about three cars wide through which the vehicle could have been removed.

There was "a whole bunch of officers" present (R. 124). One witness said there were 2 or 3 carloads of agents in the vicinity.

The petitioner was not arrested until the morning following the search, and was not even consulted about the search until after it was completed.

Dade Tire is located at the intersection of Miami Avenue and 15th Street in Miami, about 12 blocks from the federal building in which the trial was conducted.

No effort was being made or threatened by anyone to remove the automobile. We submit that this would be the least likely thing to occur on the part of any person who might have known there was liquor in the car.

No effort was made to secure a search warrant. No reason was given for not attempting to secure a warrant. The searching officers merely said they did not need one. The officers had from 6:30 p.m. to around 7:45 p.m. to seek a warrant before they closed in, and an indefinite time thereafter to seek a warrant, but they did not bother.

We respectfully submit that, under the facts of this case, where there was no showing of impracticability in obtaining a search warrant, and, in fact, a good showing that it would have been a simple matter to get a warrant, the search must be considered invalid.

In the landmark case of **Carroll v. United States**, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, which sanctioned

the stopping and search, without warrant, of a moving vehicle, the Supreme Court was careful to point out that

> "Where the securing of a warrant is reasonably practicable, it must be used."

In **Sirimarco v. United States**, CCA 10, 1963, 315 F.2nd 699, the court, while in its majority opinion upheld the validity of a search of an automobile without warrant under the facts of the case, still held, as Chief Justice Murrah stated, in his dissenting opinion:

> "It is conceded that probably cause alone did not authorize the search without a warrant... And the courts have been careful to make sure, (1) the existence of probable cause; and (2) the impracticability of securing a search warrant. And see Hart v. United States, 10 Cir. 162 F.2nd 74 and cases cited; United States v. One 1957 Ford Ranchero Pick-up Truck, 10 Cir., 265 F.2nd 21."

Here again, the Court of Appeals did not expressly repudiate these established principles of law, but, in effect, did the equivalent by judicially declaring that the securing of a warrant was not practicable by saying that the officers "had no knowledge as to when either car would be moved or how many apparent moonshiners they would have to deal with and, consequently, how much time was available or how safe it would be to deplete their forces to send one of the officers for a warrant." None of these possibilities was suggested in the trial court, and each of them is remote and speculative. Each expresses an uncertainty that might well exist in every case in-

volving a search. And we respectfully suggest that if an officer can excuse even the effort to get a search warrant on such possibilities, the requirement of getting a search warrant, whenever practicable, has been wholly nullified.

Once again, the Court of Appeals has so far departed from the accepted and usual cause of judicial proceedings that calls for an exercise of supervision by this Court.

III.

AS TO THE MATTER OF VARIANCE

The three conspiracies developed from the government's evidence are independent, parallel and in no wise derivative one of the other. Government counsel frankly conceded during the trial that two had been shown, and the court so declared. By requiring all the defendants to stand trial on the one conspiracy count, Stokes was forced to hear a volume of testimony that did not involve him; and Thompson was required to do the same. This flooding of unrelated pieces of evidence cannot be said to be harmless, for Stokes and Thompson now stand convicted, not only of a conspiracy, but of joint guilt in six substantive counts, notwithstanding that the evi- and the court declared that there was no connection between Stokes and Thompson.

In the **Berger** case, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629, CCA, 73 F.2nd 278, relied upon by the Court of Appeals as authority for saying that the variance here shown was not harmful, the second conspiracy shown

was derivative of the other. The evidence against Katz, who complained of the variance, that did not legally involve Katz, merely identified the source of the counterfeit bills Katz was trafficking. As the Court said: "Katz had to get the bills from somewhere."

In **Kotteakos v. United States,** 66 S.Ct. 1239, 328 U.S. 750, 90 L.Ed. 1557, decided in 1946, after Berger, and in **Canella v. United States,** CCA 9, 1946, 157 F.2nd 470, it was made clear that Berger was not authority for any general proposition that proof of two conspiracies where one was alleged was harmless error, but rather that each case must be determined by its own facts. On Kotteakos, there was one central figure involved in every transaction charged in the indictment, but the several transactions involved different persons not connected with all the others, in parallel but not derivative conspiracies.

Also in **Daily v. United States,** 282 F.2nd 818, CCA 9, 1960, where one conspiracy was alleged and three shown the Court of Appeals reversed, saying:

> "Sixteen persons were indicted in this case and at least three separate conspiracies were proved. In consequence, a prejudicial burden was placed on the defense of appellant Quinn "not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate."

If the Court of Appeals here had properly applied

the text of the Berger case, as stated by Judge Hand when that case was before the Court of Appeals, the text being approved by The Supreme Court on review, we submit that the variance would necessarily be deemed harmful. As quoted by Judge Hand:

> "The materiality of a variance does not depend upon the degree of its logical perversity, but upon how far it throws confusion into the trial and makes it likely to miscarry. Does it surprise the accused by calling upon him to meet a charge for which he is not prepared? Will it allow the production of evidence not competent or material to the crime he has committed, though admissible against another defendant tried at the same time? It is such considerations as these which should determine the question, rather than the extent to which the syllogism implicit in all good pleading has been violated. This is especially true when the crime is conspiracy, where much is of necessity tolerated that would not be allowed elsewhere . . ."

In the instant case,

1. Petitioner was called upon to defend himself of a charge of conspiracy with persons he never had known or heard of (Stokes, Cain, Brown and Gaither).

2. The allowance of the variance subjected petitioner to production of vast quantities of evidence not competent or material to the crimes for which he stands convicted, though competent as to other parties.

3. The jury was sufficiently confused and overwhelmed by this mass of incompetent evidence (as to petitioner) that it found Stokes and Thompson jointly guilty of possessing and operating a still, removing and concealing non-tax paid liquor, and other offenses, an impossibility once it was conceded and adjudicated that there was no connection between Stokes and petitioner.

We respectfully submit that the Court of Appeals has mis-applied the principles of the Berger case, supra, and has so far departed from the accepted course of judicial proceeding that the supervision and intervention of the Supreme Court is required.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date deposited a copy of the foregoing Petition for Writ of Certiorari in a United States mail box, with first-class postage prepaid, addressed to Honorable Lloyd Bates, Assistant U.S. Attorney, Post Office Building, Miami, Florida; Steadman Stahl, Jr., Attorney for William R. Philips,, 16 S.E. Sixth Street, Ft. Lauderdale, Florida; and Joseph Merlin, Attorney for Earl N. Stokes, 403 duPont Plaza Center, Miami, Florida; and also to the Solicitor General, Department of Justice, Washington 25, D.C., this April____, 1965.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20581

EVERITT W. THOMPSON, WILLIAM R. PHILLIPS and EARL N. STOKES,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(February 2, 1965.)

Before TUTTLE, Chief Judge, JONES and ANDERSON,* Circuit Judges.

ANDERSON, Circuit Judge: The indictment in this case charged all three defendants, Everitt W. Thompson, William R. Phillips and Earl N. Stokes, in a single count of conspiracy to defraud the United States of payment

* Of the Second Circuit, sitting by designation.

of a tax on distilled spirits and to commit offenses against the laws of the United States concerning the illicit possession, transportation and distribution of distilled spirits. Each defendant was also charged with several counts alleging the substantive offenses. In a jury trial, all were found guilty as charged and were sentenced. Each filed motions for judgment of acquittal n.o.v. or for new trial. The motions were denied and from those rulings the defendants have appealed.

The prosecution resulted from certain events of April 3, 4, and 5, 1962 which were disclosed through investigations by Federal Agent Scott and by Florida State Officials, Glass and Washburn, into the activities of the appellants in distributing and selling moonshine whiskey. Assisting them was an undercover informer, Thorn, who was named in the indictment as a co-conspirator but not as a defendant. On April 3rd Thorn advised Glass that a 1950 green Buick automobile loaded with moonshine whiskey would be parked, about supper time on April 4, 1962, in front of the house of the appellant Stokes in Miami, from which distribution of the whiskey was to be made to customers in that city. Glass told the other officers of this. They already had received from other sources information that Stokes was involved in the illicit whiskey operations in the area and that he had a record and a reputation as a liquor law violator. At about 6:30 P.M. April 4, 1962, Glass and Scott drove past Stokes' house and saw in front of it a Buick car, which matched Thorn's description and which appeared to be heavily loaded. At about 7:15 P.M. Stokes came out of his house, got in the car and drove off. Glass and Scott in one automobile and Washburn in an-

other followed him for some distance; they then stopped Stokes and seized a large quantity of illicit whiskey which was in the car.

The next morning, on April 5th, Thorn told Glass that in the evening there would be a transfer of moonshine whiskey from a Chevrolet pickup truck, owned by the appellant Phillips, to a 1953 Chrysler automobile at the premises of Dade Tire Co. in Miami. Glass gave this information to Scott. The officers had received information that the appellant Thompson, who was owner and manager of the Dade Tire Co., was engaged in illicit liquor traffic and that transfers of moonshine whiskey had taken place at the Tire Co. They had also learned that the appellant Phillips had a record and a reputation of being a liquor law violator.

At about 6:30 P.M. the officers went to the vicinity of the Dade Tire Co. and saw parked in the Tire Co. lot a Chrysler car, such as the one Thorn had described, and a Chevrolet truck with the name "Phillips" printed on its side.

The lot where the Chrysler car was parked was used for wheel realignment. It was bounded on one side by a building and on the other sides by a fence which had in it a three-car-wide opening to the street through which people having business there were free to come and go.

Thorn met Glass a little distance from the lot and told him that the whiskey was in the truck, awaiting transfer to the Chrysler. From a point 60-80 yards away, Glass, with the use of binoculars, saw the appellants Phillips and

Thompson with Thorn, moving what appeared to be five gallon jugs in burlap bags from the truck into the trunk of the Chrysler. Phillips, with Thorn in the truck with him, then drove out of the Dade Tire Co. lot and down the street past where Glass was located. Glass told the other officers what had happened. Scott in his car followed the Phillips' truck for a short distance and then pulled along side of it. The truck stopped and Phillips and Thorn got out and ran. Scott apprehended Phillips and returned with him to the Dade Tire Co. lot where Scott opened the trunk of the Chrysler and found ten five-gallon jugs of moonshine whiskey.

The appellants have made several assignments of error, on this appeal, relating to the conduct of the trial. They assert that the trial judge should not have denied their motion to compel the Government to elect which of the two conspiracies, i.e. one, the events of April 4th involving Phillips, Thorn and Stokes, and the other, the events of April 5th, involving Phillips, Thorn and Thompson, it would proceed upon. They claim a resulting variance between the single conspiracy charged and the series of events on April 4th in which Thompson was not involved and those on April 5th in which Stokes was not involved. Assuming arguendo that this is so, they make no showing of any way in which the variance was material or prejudicial to any appellant, and we cannot perceive from the record of this case, in which the evidence was clear and uncomplicated and in which there were so few defendants, how it was in any way harmful. We find in this no reversible error. *Berger v. United States*, 295 U.S. 78

(1935); *Sigers v. United States*, 321 F.2d 843 (5th Cir. 1963).

The appellants urge that the court erred in permitting the informer Thorn, over their objections, to refresh his recollection from a statement signed by him but typewritten by State Officer Kelly from the original notes made by Thorn. It appears that the statement inaccurately recited the date on which Thorn first met Glass, and Thorn's original notes were destroyed or thrown away by Thorn after Officer Kelly had typed the report. The appellants assert that there was no showing that Thorn's unaided memory on the witness stand had been exhausted or that the typewritten statement actually refreshed his recollection.

The principal requirements for the use of the statement for the purpose were that the witness demonstrated a need for having his memory refreshed and that the paper used had that effect. *N.L.R.B. v. Federal Dairy Company*, 297 F.2d 487 (1st Cir. 1962). The reliability or truthfulness of the statement was relevant only to the problem of the weight and credibility to be accorded the witness' testimony. *United States v. Riccardi*, 174 F.2d 883 (3rd Cir. 1949), cert. denied, 337 U.S. 941 (1949). See also *Fanelli v. United States Gypsum Co.*, 141 F.2d 216 (2d Cir. 1944). The fact that a government agent instead of the witness prepared the statement is inconsequential. See *Jones v. United States*, 282 F.2d 745 (4th Cir. 1960).

The trial judge has a duty to prevent a witness from putting into the record the contents of an otherwise in-

admissible writing under the guise of refreshing recollection, *Delaney v. United States*, 77 F.2d 917 (3d Cir. 1935); and, as Judge Aldrich pointed out in *Federal Dairy Company, supra*, at 489, counsel should not be permitted to give a witness a written statement, especially prepared for his use in testifying, to obviate the necessity of introducing original records, on the assumption that anything can be used to refresh recollection. Under such circumstances the witness is not really testifying from his own recollection. See McCormick, Evidence § 9 at 18 (1954).

In the present case, however, the court properly supervised the use of the statement to refresh Thorn's recollection; and, where there was an absence of the customary formalistic wording to show inability to recollect without aid and the refreshing effect of the writing, the context of the specific queries, the witness' spoken reaction and the trial judge's opportunity to observe the witness' demeanor, leave no occasion to find reversible error in his rulings on these objections.

The appellants also assign error in the denial by the trial court of their motion for a new trial on the ground that the Deputy Marshal attending the court approached one of the jurors and asked her some questions about her conversation, at recess, with the appellant Phillips. The judge in the absence of the jury advised all counsel in the case that a Deputy Marshal had disclosed to him that another Deputy Marshal had been told of the juror talking with Phillips. Phillips was interrogated about it in the presence of the judge and counsel. Appellants now claim prejudice because they were not specifically told that the

Deputy Marshal who first heard of the contact between Phillips and the juror, queried the juror as to the subject of her conversation with Phillips. When the judge advised counsel of the matter, they all had an opportunity to inquire into the circumstances further, including the chance to question the Deputy Marshal who reported to the judge and the Deputy Marshal's source of information. They were all put upon inquiry but, except for the questioning of Phillips, did not then pursue it. All counsel at that time treated the matter as inconsequential and proceeded with the trial. After the appellants were convicted and in connection with the motion for acquittal n.o.v. or a new trial, the Deputy Marshal who spoke to the juror about her conversation with Phillips, was examined about the incident at a regular court hearing. It appears from his testimony that what the juror told him of the conversation was consistent with Phillips' account, and the Deputy Marshal, himself, who was at the time in charge of the jury, simply instructed her to say nothing about it to anyone. The trial Judge decided that the incident had been harmless, and that none of the conversation or the surrounding circumstances had been prejudicial to the accused. We find no abuse of discretion. *Mattox v. United States*, 146 U.S. 140 (1892); *Roberson v. United States*, 249 F.2d 737 (5th Cir.), cert. denied 356 U.S. 919 (1958); *Bullock v. United States*, 265 F.2d 683 (6th Cir.), cert. denied 360 U.S. 909 (1959).

The appellants, in the trial court, moved to suppress the evidence of the moonshine taken from the 1950 Buick on April 4th. They now appeal from the trial judge's denial of their motion. They claim that the search vio-

lated the Fourth Amendment to the Constitution of the United States because there was lack of probable cause or in the alternative, ample opportunity to procure a warrant, which the officers did not do. The search, however, was entirely reasonable; there was probable cause which became apparent at a time when there was no opportunity to seek a warrant, and the search was valid as incidental to Stokes' arrest. *Carroll v. United States*, 267 U.S. 132 (1925); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Patenotte v. United States*, 266 F.2d 647 (5th Cir. 1959).

The appellants at the trial also moved to suppress the evidence procured in the search of the 1953 Chrysler car in the lot of the Dade Tire Co. on April 5th because, they claimed, the search was conducted without a warrant and was not incidental to an arrest. They appeal from the trial court's denial of their motion. The appellants do not dispute that there was probable cause for the search of the automobiles. Their protests that the officers had ample opportunity to obtain a warrant are based largely on hindsight. Even so, only a very brief time, approximately an hour, elapsed within which a warrant could have been obtained. Viewed prospectively the officers at 6:30 P.M. on April 5th when they saw the Chevrolet truck and the Chrysler in the Dade Tire Co. lot, at which point probable cause first attached, had no knowledge as to when either car would be moved or how many apparent moonshiners they would have to deal with and, consequently, how much time was available or how safe it would be to deplete their forces to send one of the officers for a warrant. Phillips, within the observation and knowledge of the officers, was

involved with the use of both the Chevrolet truck from which he had taken the bags and containers and the Chrysler car in which he had put them. He was driving away in the Chevrolet truck when he was arrested. He was immediately returned to the Dade Tire Co. lot and a search of the Chrysler was made forthwith.

It is our conclusion that the search of both automobiles was made on probable cause, when it was impracticable to obtain a warrant, and was not unreasonable. Moreover, the search of the Chrysler was not so remote in time and distance as not to be incident to the arrest of Phillips, and the action was necessary to preserve evidence of the offenses. *United States v. Rabinowitz, supra.* See also *Preston v. United States,* 376 U.S. 364 (1964); *Ker v. California,* 374 U.S. 23 (1963).

We have considered the remaining claims made by the appellants and conclude that they are without merit. The judgments are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20581

D. C. Docket No. 63-21-CR-EC

EVERITT W. THOMPSON, WILLIAM R. PHILLIPS and EARL N. STOKES,

Appellants

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, JONES and ANDERSON,* Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

Issued as Mandate: February 2, 1965

* Of the Second Circuit, sitting by designation.

[175] Anderson, J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20,581

EVERITT W. THOMPSON, WILLIAM R. PHILLIPS and EARL N. STOKES,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Southern District of Florida

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ON PETITIONS FOR REHEARING

( )

Before TUTTLE, Chief Judge, JONES and ANDERSON*, Circuit Judges.

PER CURIAM

IT IS ORDERED That the petitions for rehearing filed by each of the defendants in the above entitled and numbered cause be, and they are hereby DENIED.

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* Of the Second Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20581

EVERITT W. THOMPSON, WILLIAM R. PHILLIPS and EARL N. STOKES,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant Everitt W. Thompson in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant Everitt W. Thompson to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from March 12, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from March 12, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon

the expiration of thirty days from March 12, 1965 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Robert P. Anderson
United States Circuit Judge.

Dated: (ORIGINAL FILED MARCH 31, 1965)